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NO. 88-1190

In The Supreme Court of the United States

OCTOBER TERM, 1988

WILBUR H. FRIEDMAN, JR.,
Petitioner

v.

MONTGOMERY COUNTY, MARYLAND
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

(1) Whether Maryland's Court of Special Appeals improperly concluded that Petitioner did not enjoy standing to invoke an ordinance which privileged conduct in which Petitioner sought to engage;

(2) Whether the Court of Special Appeals improperly denied Petitioner's motion to publish its decision.

TABLE OF CONTENTS

REFERENCE TO OPINIONS BELOW.....1

JURISDICTION.....2

RELATED CASES.....3

STATEMENT.....3

1. Two regulatory schemes, the zoning code and the animal control ordinance, are in conflict.....4

2. At all times Petitioner has attempted to assert the rights arising from the animal control ordinance.....9

3. Petitioner has found no state forum in which to assert the rights arising from the ordinance.....10

4. Petitioner's wife was delicensed as a dog fancier precisely because of the fences in the back yard.....11

5. Petitioner has "owned" dogs.....12

6. Petitioner has been threatened with criminal prosecution for maintaining the fences.....12

7. Petitioner did in fact apply for a fancier's license. Department of Animal Control denied the license based on a decision of the Animal Matters Hearing Board limiting the number of dogs Petitioner could keep on his premises. But the decision of the Animal Matters Hearing Board was based on its knowledge that Petitioner's wife had been delicensed as a fancier.....13

8. Few if any individuals who have filed the appropriate forms with, and paid their fees to, the local zoning authority, have been denied standing in the appropriate administrative agency and the courts to contest the denial of the building permit they have sought...16

9. In three cases in which Petitioner has been involved, the Court of Special Appeals has issued unpublished decision which have no precedential value but which enunciate important principles of law.....17

ARGUMENT.....21

1. The animal control ordinance has created a constitutionally protected property interest. The state administrative agency and the state courts could not deny Petitioner a forum in which to assert the interest because there was no claim or evidence that the state procedural rule has been regularly or consistently followed.....21

2. The state administrative agency and the state courts could not deny Petitioner a forum in which to assert the interest on the grounds of standing even if it had been established that the state procedural rule has been regularly and consistently followed....24

3. By its denial of certiorari in 88-656, this Court has imposed upon itself the job of assuring that Petitioner enjoys the constitutionally protected right created by the animal control ordinance.....28

4. Under any rational accommodation of the zoning code and the animal control ordinance, Petitioner is entitled to maintain the fences in his back yard...30

5. The Court of Special Appeals' election to issue an unpublished decision, its denial of Petitioner's motion to issue a published decision, and the Court of Appeals' refusal to require a published decision, were all inseparably connected with the due process violation above.....31

6. The Court of Special Appeals decides, in a random manner, and by unexplained criteria, whether to issue published or unpublished decisions, leading to different outcomes. Assuming arguendo that such conduct could be justified by a sufficiently strong state interest, that interest would have to be compelling. Here, however, no interest has been advanced. Accordingly, the decision to issue an unpublished decision in a case such as this is itself a denial of due process.....32

7. Where, as here, the Court of Special Appeals has decided, by means of unexplained criteria, and without advancing a reasonable and identifiable governmental objective, to issue an unpublished decision, the Court of Special Appeals has denied Petitioner equal protection.....36

CONCLUSION.....37

APPENDIX

Maryland Court of Appeals' order

denying Petitioner's motion for reconsideration dated October 24, 1988..1

Court of Appeals' denial of petition for certiorari, dated August 29, 1988.....2

Orders of Court of Special Appeals dated June 20 and 21 denying motion for reconsideration and motion to issue published decision herein.....3

Unreported decision of the Court of Special Appeals dated May 18, 1988.....4

Decision of the Circuit Court for Montgomery County, Maryland dated October 27, 1987 denying motion for reconsideration.....12

Decision of the Circuit Court for Montgomery County, Maryland dated September 22, 1987 affirming Board of Appeals for Montgomery County.....13

Decision of the Board of Appeals dated February 3, 1987 affirming hearing examiner.....15

Hearing Examiner's report and recommendation dated August 21, 1986...18

TABLE OF AUTHORITIES:

CASES:

Babbitt v. Farm Workers, 442 U.S. 289 (1978).....27
Bice v. Mississippi, ___ U.S. ___ (June 13, 1988).....24
Bloor v. Montgomery County, No. 87-1239, certiorari denied March 20, 1988 .....3, 15, 19, 33
Board of Regents v. Roth, 408 U.S. 564 (1972) 22
City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___ (June 17, 1988) 30
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).....22
Cramp v. Bd. of Public Instruction, 368 U.S. 278 (1961) 27
Criminal No. 39216.....13
Friedman v. Montgomery County, No. 88-656, certiorari denied December 12, 1988 .....3, 28, 29
Glover v. St. Louis.San Francisco Railway Co., 393 U.S. 24 (1969).....26
James v. Kentucky, 466 U.S. 341 (1984)..24
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 22, 35, 36
Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir 1978).....34
Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 26
Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).....26
Pleasant View Elementary School v. Group 1 Defendants, 763 F.2d 652 (4th Cir. 1985), cert. denied 474 U.S. 1021 (1985) 18, 19, 33
Staub v. City of Baxley, 355 U.S. 313 (1958) 23

STATUTES:

State Government Article, Sec. 10-201(c) 19

MARYLAND RULES:

Rule 1092(b).....18
Rule 1092(c).....18
Rule 813(a).....18
Rule 814(a).....18

ORDINANCES OF MONTGOMERY COUNTY:

Chapter 5.....9
Section 5-1.....5
Section 5-30.....6
Section 5-31.....6, 11
Section 5-32.....6, 11
Section 5-67(c).....7,15
Section 5-67(f).....7
Section 59-C.1.31.....5, 9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILBUR H. FRIEDMAN, JR. [1]
Petitioner

v.

MONTGOMERY COUNTY, MARYLAND
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner Wilbur H. Friedman, Jr., Plaintiff-Appellant below, petitions the Court to review (1) the Court of Special Appeals' conclusion that Petitioner did not have standing to invoke an ordinance which privileged conduct in which Petitioner sought to engage and (2) the court's order denying Petitioner's motion to publish its decision.

REFERENCE TO OPINIONS BELOW

The Appendix hereto contains: (A) The Maryland Court of Appeals' order denying Petitioner's motion for reconsideration,

1. Below, Wilbur H. Friedman.

dated October 24, 1988; (B) Court of Appeals' denial of petition for certiorari dated August 29, 1988; (C) Orders of Court of Special Appeals dated June 20 and 21 denying motion for reconsideration and motion to issue published decision herein; (D) Unreported decision of the Court of Special Appeals dated May 18, 1988; (E) Decision of the Circuit Court for Montgomery County, Maryland dated October 27, 1987 denying motion for reconsideration; (F) decision of the Circuit Court for Montgomery County, Maryland dated September 22, 1987 affirming Board of Appeals for Montgomery County; (G) decision of the Board of Appeals dated February 3, 1987 affirming hearing examiner; and (H) Hearing Examiner's report and recommendation dated August 21, 1986.

JURISDICTION

This Court's jurisdiction is invoked

under 28 U.S.C. Sec. 1254(1) and 2101(c). The Court of Appeals' order denying Petitioner's motion for reconsideration was filed on October 24, 1988.

RELATED CASES

This case is related to Bloor v. Montgomery County, No. 87-1239, certiorari denied March 20, 1988 and to Friedman v. Montgomery County, No. 88- 656, certiorari denied December 12, 1988.

STATEMENT

This is a case in which an administrative agency and three state courts have refused to look outside one regulatory scheme, the zoning code, to determine whether a "use" said to be barred by the zoning code is required or permitted by another regulatory scheme, namely the animal control ordinance, and refused to harmonize the two regulatory schemes. By so doing they have denied Petitioner a

forum in which to assert rights arising from that second regulatory scheme. The Court of Special Appeals reasoned that Petitioner did not enjoy standing to invoke the second regulatory scheme. This rule of standing departs from the general rules of standing, and is below the Constitutional threshold of standing propounded by this Court. The Court of Special Appeals has used the means of an unpublished decision so that no other litigant need ever be affected by the ruling, and to reduce the probability of review by the Court of Appeals of Maryland and this Court.

1. Two regulatory schemes, the zoning code and the animal control ordinance, are in conflict.

While the zoning code has been said to bar the fences which Petitioner seeks to erect, the animal control ordinance priv-

ileges and requires them. More particularly, Section 59-C-1.31 of the Montgomery County zoning code states that kennels, non-commercial are permitted uses in the zone wherein Petitioner resides, provided that "no accessory buildings, enclosures or runs may be constructed or used for these dogs." On the other hand, the animal control ordinance requires and permits property owners to maintain "enclosures." Thus, under Section 5-1, definitions, a dog fancier is a person who keeps three or more dogs used for various purposes, including show, "within or adjoining a private residence" and a dog fancier's kennel is a "private kennel maintained by a dog fancier within or adjoining a private residence for the maintenance... of [certain] dogs owned or kept by such dog fancier." An "owner" includes "any person who... harbors [or] exercises

control over... any animal..."

Section 5-30 requires the owner of a female dog while in heat to "confine it in a building, compartment, or other secure enclosure in such a manner as to prevent the attraction of other dogs." Section 5-31 requires the owners of a vicious or dangerous animal to keep such animal "confined in a building, compartment, or other secure enclosure in such a manner as will prevent direct contact between such animal and human beings or other animals." Section 5-32 requires an owner of an attack dog to "keep said dog confined in a building, compartment, or other secure enclosure; provided, that any such enclosure is completely surrounded by a fence....The area of confinement shall have all gates and entrances thereto securely closed and locked and all fences properly maintained escape

proof." Section 5-67(c) requires dog fancier's kennels to be licensed; permits surplus puppies to be bred occasionally and sold by the fancier if the breeding is for a noncommercial purpose and not the primary function of the kennel; establishes a prima facie test of commercial breeding, namely six litters a year; and exempts dog fanciers from the requirement of licensing dogs individually. Section 5-67(f) prohibits the issuance of licenses for any establishment the location or other characteristics of which violates the Zoning Code.

There is obviously tension between the animal control ordinance and the zoning code. Thus, some dog fanciers have attack dogs, vicious and dangerous dogs, and many have female dogs which are at times in heat. It is bizarre to require fanciers who fear that some of their dogs may be

dangerous, e.g., males when female dogs are in heat, to prove that they are dangerous before confining them. In addition, it is difficult to see how dogs can be maintained "adjoining a private residence" without fences. Again, as fences are often necessary to confine puppies, the right to breed puppies would seem to imply a right to use fences to confine them.

Finally, the legislative history of the 1976 amendments to the zoning code, which permitted dog fancier operations in the denser zones subject to the provision that "no accessory buildings, enclosures or runs may be constructed or used for these dogs," indicates as follows: First, the proponents of the amendment were dog fanciers in the denser zones. Second, the proponents believed that the ordinance would increase and not decrease their

rights, even with the proviso; thus, Captain Gaasterland of Kensington, a proponent and fancier, stated that he maintains "well fenced runway space" for his dogs (TR.21). Third, those of the fanciers who were breeders believed that the enactment of the ordinance would impose no undue limitation upon their activity of breeding dogs. [2]

2. At all times Petitioner has attempted to assert the rights arising from the animal control ordinance.

Thus, the statement of issues in Petitioner's prehearing brief to the hearing examiner reads:

> 1. Whether the Board of Appeals should consider certain provisions of the Animal Control Ordinance, Chapter 5 of the Montgomery County Code. 2. If so, whether the Board of Appeals should read Section 59-C-1.31 of the zoning code in such a manner as to be in harmony with Animal Control Ordinance....

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2. The legislative history is set forth in Petitioner's prehearing brief to the hearing examiner, Part 3.3.

In his brief on appeal to the Circuit Court for Montgomery County, Petitioner argued, part 2.2, that:

> In the instant case, the Board, by its hearing examiner, erred by refusing to consider the impact of the Animal Control Ordinance on the zoning code.

In his brief to the Court of Special Appeals, the sole question was:

> Whether the Board of Appeals for Montgomery County and the Circuit Court for Montgomery County are required to look outside the zoning code to determine whether a "use" said to be barred by the Zoning Code is required or permitted by another regulatory scheme, and whether the Board and the Circuit Court are required to harmonize the two regulatory schemes.

And Petitioner's petition for certiorari to Maryland's Court of Appeals sets forth as issue 1.2 whether the Court of Special Appeals erred "by its method of dealing with the two regulatory schemes."

3. Petitioner has found no state forum in which to assert the rights arising from the ordinance.

The Board of Appeals and the Circuit

Court simply refused to consider the issue. Sua sponte, the Court of Special Appeals found that Petitioner lacked standing to invoke the ordinance. More particularly, the Court of Special Appeals said:

> Appellant does not contend that he is a dog fancier, owns a dog fancier's kennel, is licensed to operate a dog fancier's kennel or has applied for a license to operate a dog fancier's kennel, which was refused. At best, he is contending that his wife is a dog fancier. Even at that, however, he implicitly acknowledges that the purpose for seeking a variance as to enable his wife to run a kennel, non-commercial on the property. Accordingly, appellant does not have standing to make an argument premised on these sections. Appellant conceded at oral argument that he does not have vicious or dangerous animals, Sec. 5-31, or attack dogs, Sec. 5-32. Consequently, he does not have standing pursuant to these sections either.

4. Petitioner's wife was delicensed as a dog fancier precisely because of the fences in the back yard.

As set forth at paragraph 3.63 of Petitioner's prehearing brief in the zoning case, by letter dated August 15, 1985, the Department of Animal Control revoked

Bloor's dog fancier's license on the stated grounds that the requirements of the zoning code have not been complied with.

5. Petitioner has "owned" dogs.

As noted above, under the animal control ordinance, an "owner" includes "any person who... harbors [or] exercises control over... any animal..." Petitioner both harbors and exercises control; he owns the property where the dogs are located. At the zoning hearing, Petitioner testified, TR. p. 55, line 13 ff. that he:

> fe[d] the dogs... walk[ed] the dogs... medicate[d] the dogs.... [TR. p. 58, line 20 ff.] had the companionship of the dogs... had a choice of dogs of which ones to walk... [3]

6. Petitioner has been threatened with criminal prosecution for maintaining the

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3. The animal control ordinance was almost surely written to broaden the meaning of ownership, so that persons who disclaimed ownership could be charged with ownership of, and hence legal responsibilities for, animals.

fences.

As set forth in paragraph 3.61 of the prehearing brief, in May 1985, DEP issued Petitioner a "citation for civil offense" for maintaining the enclosures and a kennel, non-commercial in his backyard. This citation became the subject of a trial in District Court, and an appeal to Circuit Court in Criminal No. 39216, which that court dismissed the complaint for insufficient evidence of violation. [4] The County Attorney's brief to the Court of Special Appeals states, at p. 6, par. 4:

> It was as a result of [Criminal No. 39216] that in August 1985, [Petitioner] filed for and was denied a building permit [that led to the petition for a variance. [5]

7. Petitioner did in fact apply for a fancier's license. Department of Animal

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4. The court did not consider the interplay between the two regulatory schemes.
5. The County Attorney's office waffled between criminal and civil prosecutions, and eventually settled on the civil prosecution.

Control denied the license based on a decision of the Animal Matters Hearing Board limiting the number of dogs Petitioner could keep on his premises. But the decision of the Animal Matters Hearing Board was based on its knowledge that Petitioner's wife had been delicensed as a fancier.

As set forth in Petitioner's motion to Maryland's Court of Appeals for reconsideration of its denial of certiorari, Petitioner did apply for a fancier's license, which was refused him. More particularly, in late September 1986, Petitioner removed the fences from the back yard that are the subject of the petition for a variance, and applied for a license. By letter dated November 7, 1986, the Department of Animal Control denied the license, on the following grounds: (1) A dog fancier is one who keeps three or

more dogs. (2) In early 1986, the Animal Matters Hearing Board restricted the number of dogs that could be kept on the premises to two. (3) Hence, Petitioner is ineligible to become a dog fancier.

As set forth more fully in Bloor v. Montgomery County, No. 87-1239, on June 24, 1987, Petitioner found a in the files of the Department of Animal Control a letter to AMHB, dated June 30, 1986, from Dr. Braddy, who participated in AMHB's decision in this case. The letter, in relevant part, reads:

> It was the understanding of the Board [in the nuisance case] that Mrs. Bloor was no longer licensed as a dog fancier.... A preponderance of evidence showed that the animals in the stated case were being maintained for breeding and the sale of offsprings on a commercial scale. It is understood that without properly being licensed as a dog fancier Ms. Bloor lost her privilege to function as a dog fancier...thereby reverting her status of operation to that of commercial kennel, as outlined in... Section 5-67(c) [of the Montgomery County Code.]

In sum, Petitioner's wife was delicensed as a dog fancier because of the backyard fences. She and Petitioner were limited in the number of dogs they could maintain because she was not a fancier. Petitioner was denied a fancier's license because the number of dogs he could maintain was less than the number necessary to be a fancier. And Petitioner was denied standing to challenge the propriety of the prohibition against fences because he was not a fancier.

8. Few if any individuals who have filed the appropriate forms with, and paid their fees to, the local zoning authority, have been denied standing in the appropriate administrative agency and the courts to contest the denial of the building permit they have sought.

Petitioner's researches have revealed no denial of standing to such individuals.

On the contrary, the law of zoning is based on the premise that an individual who, like Petitioner, has filed the appropriate forms with the local zoning authority, paid the fees, and then been denied the building permit he seeks, has suffered sufficient injury to enjoy standing. Questions of standing are typically raised in a quite different context: when neighboring businesses and homeowners claim that they are injured by the granting of the building permit. This case is unique in that it questions the intent of the individual who applied for the building permit.

9. In three cases in which Petitioner has been involved, the Court of Special Appeals has issued unpublished decision which have no precedential value but which enunciate important principles of law.

Between 1976 and July 1, 1988, Mary-

land Rule 1092(b) provided, in relevant part, that:

An opinion [of the Court of Special Appeals] which is not of substantial general interest as a precedent shall be per curiam and shall not be published.

Rule 1092(c) provided in relevant part that:

An unreported decision... is not a precedent within the rule of stare decisis, and shall not be cited by a court or party for any purpose, in any unrelated action or proceeding..." [6]

In Pleasant View Elementary School v. Group 1 Defendants, 763 F.2d 652, 655 (4th Cir. 1985), cert. denied 474 U.S. 1021 (1985), the court noted that the Court of Special Appeals had affirmed a decision of a trial court that the state administra-

6. New Rule 813(a) reads: "The Court of Special Appeals shall designate for publication only those opinions that have substantial general interest as precedent." New Rule 814(a) reads: "An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority."

tive procedure act did not confer subject-matter jurisdiction over a school closing. There was no jurisdiction because school closures were not "contested cases" (i.e., adjudications) within the meaning of what is now Sec. 10-201(c) of the State Government Article, Annotated Code of Maryland. The Pleasant View case does not appear in the annotation because it is unpublished. Petitioner submits that there is a substantial general interest in the case-by-case definition of the meaning of a "contested case."

In Bloor v. Montgomery County, No. 87-1239, the Court of Special Appeals said:

> [Petitioners] complain that the Board's opinion does not contain proper findings of fact, but merely parrots the language of [the ordinance.] We do not agree. Under the circumstances, we believe the Board's requirements are adequate and comply with the statutory requirements. Although the feelings involved are complex, the facts are quite simple: since 1981, a number of large dogs have been living, mostly in the back yard, on a one-half acre lot in a residential neighborhood.

During the hottest, most humid months of the year, 27 such dogs lived there. The noise and stench is easy to imagine. To require more specific fact finding in this case would be distasteful and unnecessary.

Thus, the Court of Special Appeals has stated that a large number of dogs in a residential neighborhood is malum in se, and that ordinance or no ordinance, the dog operation can be abated by the courts. The court propunded a novel view of the effect of a valid ordinance upon the common law. In addition, the Montgomery County Department of Animal Control does not regard itself as affected by this language; as late as November 1988, it continues to issue applications for fancier-licenses to individuals who live in residential neighborhoods. The form indicates that the current licensing fee for a kennel with 3-10 dogs is $20. per year for all the dogs, while the licensing fee for a kennel of more than 10 dogs is $40. per

year.

In the instant case, the Court of Special Appeals did not cite to any authority for the proposition that Petitioner had no standing to invoke the rights arising from the animal control ordinance, and there is no such authority. As will be seen below, the authority goes the other way.

ARGUMENT

1. The animal control ordinance has created a constitutionally protected property interest. The state administrative agency and the state courts could not deny Petitioner a forum in which to assert the interest because there was no claim or evidence that the state procedural rule has been regularly or consistently followed.

The animal control ordinance, whose validity the Respondents have never disputed, creates a constitutionally protected

property interest. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-431 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985). Before Petitioner can be deprived of the interest, due process requires "an opportunity for hearing appropriate to the nature of the case." Roth, at p. 570 and fn. 7; Logan at p. 437. Due process requires "constitutionally adequate procedures." Loudermill, at p. 541. A hearing in which the ordinance creating the protected interest is not considered is not a hearing "appropriate to the nature of the case" and is constitutionally inadequate.

There was no claim or evidence that the state procedural rule has been regularly or consistently followed. The Board of Appeals and the Circuit Court did not rely on the doctrine of standing. The Respon-

dent did not claim that Petitioner lacked standing to invoke the animal control ordinance. The Court of Special Appeals invoked the doctrine of standing sua sponte, and cited no case to support its conclusion, and Petitioner's research has revealed none. Thus, there was neither claim nor evidence that the state procedural rule has been regularly or consistently followed. Hence, the state procedures here were not constitutionally adequate. This case is controlled by such cases as Staub v. City of Baxley, 355 U.S. 313, 319 (1958) (State court finding that constitutional attack should have been made on specific sections of the ordinance and not on the ordinance as a whole was not adequate nonfederal basis; "[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."), and cases

cited therein at pp. 318-319; James v. Kentucky, 466 U.S. 341 (1984) (State court finding that constitutional defense should have used word "instructions" rather than word "admonitions" not adequate nonfederal basis; and Bice v. Mississippi, ___ U.S. ___, June 13, 1988. (A state procedural ground is not "adequate" unless the rule is strictly or regularly followed.)

2. The state administrative agency and the state courts could not deny Petitioner a forum in which to assert the interest on the grounds of standing even if it had been established that the state procedural rule has been regularly and consistently followed.

This is a case where Petitioner applied for a zoning variance to erect fences in his back yard and claimed, inter alia, that the provisions of the animal control ordinance relating to dog fanciers privi-

leged his conduct. The Court of Special Appeals responded that Petitioner did

> not contend that he is a dog fancier, owns a dog fancier's kennel, is licensed to operate a dog fancier's kennel or has applied for a license to operate a dog fancier's kennel, which was refused,

and therefore lacked standing to invoke the sections of the animal control ordinance relating to fanciers. The denial of standing was improper.

Thus, first, Petitioner's wife was delicensed as a dog fancier precisely because of the fences in the back yard. Second, Petitioner "owned" the dogs within the meaning of the animal control ordinance. [7] Third, Petitioner has been threatened with criminal prosecution for maintaining the fences while maintaining a "kennel non-commercial," the zoning code's

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7. There has never been any question that the dogs are show dogs within the meaning of the animal control ordinance, i.e., dogs which qualify Petitioner to be a fancier.

analog of a dog fancier operation. And fourth, Petitioner did in fact apply for a fancier's license. Department of Animal Control denied the license based on a decision of the Animal Matters Hearing Board limiting the number of dogs Petitioner could keep on his premises. But the decision of the Animal Matters Hearing Board was based on the fact that Petitioner's wife had been delicensed as a fancier.

Under any rational doctrine of standing, Petitioner enjoys standing to invoke the rights arising from the animal control ordinance. First, to require Petitioner to have applied to the same agency for a fancier's license that had delicensed Petitioner's wife was to require a wholly futile act. Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 24 (1969). [8]

8. See also Patsy v. Florida Board of Regents, 457 U.S. 496, 514 (1982) (Judge-made requirements of exhaustion would

Second, Petitioner "owns" the dogs, and was the subject of an order by the Animal Matters Hearing Board to limit the number of dogs. Rare indeed is a holding that an individual has standing to lose a statutory privilege, but not to regain it. Third, the threat of criminal prosecution alone would create, on constitutional grounds, standing to attack an ordinance which barred the conduct in which an individual seeks to engage. [9] A fortiori, Petitioner has standing to invoke an ordinance which privileges the conduct in which he seeks to engage. Fourth, a decision that Petitioner could be denied a fancier's license because his wife had been delicensed as a fancier, but had no standing to attack the propriety of the action

"create costly, remedy-delaying, and court-burdening litigation if [created] incrementally by the judiciary...

9. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 62 (1976); Babbitt v. Farm Workers, 442 U.S. 289, 298 (1978).

delicensing her, means that Petitioner and his wife were in privity in one direction but not in the other. In the unlikely event that such asymmetries have any place in the law, Petitioner was entitled to a better explanation than the one the Court of Special Appeals provided. Fifth, and in any event, the Court of Special Appeals' doctrine of standing was more restrictive than the constitutional standard that this Court would apply. Accordingly, the Court of Special Appeals should have applied this Court's own, less restrictive, standard. Cramp v. Bd. of Public Instruction, 368 U.S. 278, 282-285 (1961).

3. By its denial of certiorari in 88-656, this Court has imposed upon itself the job of assuring that Petitioner enjoys the constitutionally protected right created by the animal control ordinance.

No. 88-656 was a civil rights action,

in which, ideally, the lower federal courts could have either accommodated the animal control ordinance with the zoning code, or referred the issue to Maryland's Court of Appeals under Maryland's Uniform Certification of Questions of Law Act. The lower federal courts elected not to do so, and by its denial of the petition for certiorari in 88-656, this Court did not require them to do so. Now, if this Court does not grant certiorari, Petitioner will have been deprived of the constitutionally protected right created by the animal control ordinance. Moreover, if the Court does not accommodate the two ordinances, or require the state court system to accommodate them, administrative officers of Montgomery County, Maryland, will enjoy the discretion to apply one of the two ordinances on Mondays, Wednesdays and Fridays, and the other on Tuesdays, Thurs-

days, and Saturdays, with opposite outcomes, and without any judicial restraint on their discretion. This Court has noted, in First Amendment cases, that discretion far more bridled chills the enjoyment of constitutionally protected rights. [10]

4. Under any rational accommodation of the zoning code and the animal control ordinance, Petitioner is entitled to maintain the fences in his back yard.

It is uncontested that the fences are reasonably necessary to a dog fancier operation. The fences are clearly minimal kinds of structures. No contention was raised at the zoning hearing that the

10. City of Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___ (June 17, 1988)(Ordinance giving mayor the authority to grant or deny applications to place newsracks on public property gives him such discretion as to create a prior restraint and may intimidate parties into censoring their own speech. The absence of express standards makes it difficult to distinguish between legitimate and illegitimate denials of permits.)

fences, as opposed to the dogs, impair the character of the neighborhood. The legislative history of the 1976 amendments to the zoning code indicate that the County Council was not seeking to impose crippling limitations on the ability of dog fanciers to maintain dog fancier operations at their homes.

5. The Court of Special Appeals' election to issue an unpublished decision, its denial of Petitioner's motion to issue a published decision, and the Court of Appeals' refusal to require a published decision, were all inseparably connected with the due process violation above.

Petitioner has established that the Court of Special Appeals' reasoning and result sharply diverge from principles propounded by this Court, and indeed, from state principles of zoning jurisprudence. It follows that the Court of Special Ap-

peals could not have issued a published decision herein based on the same reasoning and reaching the same result, because, as is also true of the other cases in which Petitioner has been involved, a published decision herein would have urgently invited review by Maryland's Court of Appeals and if necessary by this Court. The use of an unpublished decision makes, and, Petitioner submits, was designed to make, such review less urgent and to minimize the probability of such review. But this establishes that the due process violation and the use of the unpublished decision were inseparably connected.

6. The Court of Special Appeals decides, in a random manner, and by unexplained criteria, whether to issue published or unpublished decisions, leading to different outcomes. Assuming arguendo that such conduct could be justified by a

sufficiently strong state interest, that interest would have to be compelling. Here, however, no interest has been advanced. Accordingly, the decision to issue an unpublished decision in a case such as this is itself a denial of due process.

As noted above, until July 1, 1988, the rules of the Court of Special Appeals permitted the issuance of unpublished decisions where the decisions were not of "general substantial interest as a precedent." The decisions in the instant case, in the Pleasant View case, and in Bloor v. Montgomery County [11] clearly were of general substantial precedential interest. The decisions to issue unpublished decisions were random.

Where a court issues a published decision, it takes greater pains to follow,

11. Had the Bloor case been decided the other way, it might not have been of precedential interest.

advance, distinguish, or modify, precedent. And a published decision, unlike an unpublished one, creates precedent to be followed, distinguished, or modified; accordingly, the court will give consideration not only to the case before it, but to future, similar cases. Hence the probability is substantial that a published decision will differ in result from an unpublished one.

More generally, publication by intermediate appellate courts of those decisions which do not tread well worn paths will serve the same purposes that are served by reasoned decisions of administrative agencies. Thus, as Judge Davis said of the requirement that administrative agencies state reasons:[12]

> The fundamental principle of reasoned explanation embodied in [various decisions of this Court]... serves at least three

12. Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857 (1978).

interrelated purposes: enabling the [reviewing] court to give proper review to the administrative determination; helping to keep the administrative agency within proper authority and discretion, as well as helping to avoid and prevent arbitrary, discriminatory and irrational action by the agency; and informing the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review.) [13]

An unpublished decision is much less likely to achieve these objectives. An unpublished erroneous decision is far less offensive to a higher court than is a published erroneous decision. Hence an unpublished decision is less likely to be reviewed, enabling the lower court with greater impunity to reach a result which (a) is different from the result it would have reached in a published decision; (b) departs from precedent established by the higher court; and (c) is arbitrary, discriminatory or irrational.

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13. Litigants perceive an unpublished decision as a vigorous suggestion not to appeal.

For all these reasons when, as here, the Court of Special Appeals decides in a random manner and by unexplained criteria that a decision should be unpublished, it is denying the litigants process that it would otherwise afford them. Assuming arguendo that such conduct could be justified by a sufficiently strong state interest, [14] that interest would have to be compelling. Here, however, no interest has been advanced.

Accordingly, the decision to issue an unpublished decision in a case such as this is itself a denial of due process.

7. Where, as here, the Court of Special Appeals has decided, by means of unexplained criteria, and without advancing a reasonable and identifiable governmental objective, to issue an unpublished decision, the Court of Special Appeals has de-

14. See Logan v. Zimmerman Brush Co., supra, at p. 434, and cases cited.

nied Petitioner equal protection.

By segregating litigants into two groups accorded radically disparate treatment, in a manner not "rationally related to legitimate governmental objectives," the practice of the Court of Special Appeals denies Petitioner the lowest permissible level of equal protection. [15]

CONCLUSION

This Court should grant certiorari and find that Petitioner at all times enjoyed standing to invoke the rights created by the animal control ordinance, and that the Maryland courts could not cut off the rights by denying him a forum in which to assert those rights. The Court should conclude that under any rational accommodation of the zoning code and the animal control ordinance, Petitioner was entitled to maintain the fences in his back yard.

15. See Logan v. Zimmerman Brush Co., supra, at pp. 438 ff. (concurring opinion).

Accordingly, and in view of the passage of time since Petitioner filed his application for a building permit, the Court should decide this issue. The Court should also find that it was improper for the Court of Special Appeals to issue an unpublished decision in this case. In the event the Court remands to the Maryland courts for consideration of the zoning issue, it should require that any decision of the Court of Special Appeals be published. Alternatively, the Court should make such other disposition as is just and proper.

Respectfully submitted,

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IN THE COURT OF APPEALS OF MARYLAND

WILBUR H. FRIEDMAN

v. Petition Docket No. 189 (No. 1414, Sept. Term 1987 Court of Special Appeals)

MONTGOMERY COUNTY, MARYLAND

ORDER

Upon consideration of the motion for reconsideration filed in the above-entitled case, it is this 24th day of October, 1988,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy, Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

WILBUR H. FRIEDMAN

v. Petition Docket No. 189 (No. 1414, Sept. Term 1987 Court of Special Appeals) No. 189

MONTGOMERY COUNTY, MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above-entitled case, it is ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable or in the public interest.

/s/ Robert C. Murphy, Chief Judge

Dated: August 29, 1988

COURT OF SPECIAL APPEALS

June 22, 1988

Mr. Wilbur H. Friedman
11404 Norris Drive
Silver Spring, Md. 20902

Re: Wilbur H. Friedman vs. Montgomery County, Maryland
No. 1414, September Term, 1987

Dear Mr. Friedman:

Be advised that by Order dated June 20, 1988, this Court denied your Motion for Reconsideration of its per curiam opinion filed on May 18, 1988.

By Order dated June 21, 1988, all other motions filed by appellant were denied.

The mandate of this Court, which was issued this date, is enclosed.

Very truly yours,

Howard E. Friedman
Clerk

Enclosure

cc: A. Katherine Hart, Esquire

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 1414

September Term, 1987

WILBUR H. FRIEDMAN

v.

MONTGOMERY COUNTY, MARYLAND

Garrity
Bell, Robert M.
Getty, James S. (Retired, specially assigned)

PER CURIAM

Filed May 18, 1988

This is an appeal by Wilbur H. Friedman, appellant, from the judgment of the Circuit Court for Montgomery County affirming the County Board of Appeals' dismissal of appellant's petition for variance. It presents but one question:

Whether the Board of Appeals for Montgomery County and the Circuit Court for Montgomery County are required to look outside the zoning code to determine

whether a "use" said to be barred by the Zoning Code is required or permitted by another regulatory scheme, and whether the Board and the Circuit Court are required to harmonize the two regulatory schemes.[1] We will affirm.

Appellant's residence is located in the R-60 zone in Montgomery County. A permitted use in that zone is a "kennel, non-commercial", [2] "[p]rovided that no accessory buildings, enclosures or runs

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1. Appellant purports to reserve for the federal courts an additional question: "Whether, by its failure to consider the other regulatory scheme, the Circuit Court has committed a constitutional tort by denying Land owner a forum in which to assert rights arising from that second regulatory scheme." He makes no argument on that issue and, thus, we will also refrain from doing so.

2. Sec. 59-A-2.1 of the Montgomery County Code defines "kennel, non-commercial", as [a]ny building or buildings and land use, designed or arranged for the boarding, breeding or care of dogs, cats, pets, fowl or other domestic animals belonging to the owner thereof, kept for purposes of show, hunting, or as pets, not including riding stables."

may be constructed or used for these dogs." Sec. 59-C-1.31, Montgomery County Code. The County Board of Appeals is authorized by Sec. 59-A-4.11(b) to hear and decide "[p]etitions for variances from the strict application of [the Zoning Ordinance], as provided in Article G-3"; however, the Board may not, "under the guise of a variance,... authorize a use of land not otherwise permitted," Sec. 59-G-3.1.(d), or "validate, ratify or legalize any violation of law or any of the regulations of [the zoning ordinance.] Sec. 59-A-4.126.

On August 6, 1985, appellant filed an application with the Montgomery County Department of Environmental Protection for a permit to erect a series of fences on his property. The purpose of the fences was "to pen puppies for owner's kennel, non-commercial." That application was

denied on the basis of the prohibition contained in Sec. 59-C-1.31. Appellant did not appeal the denial; rather he submitted an application to the County Board of Appeals for a variance from the application of Sec. 59-C-1.31.

Appellant's application for variance was referred to a hearing examiner. The hearing examiner, after conducting a public hearing, filed his report and recommendation, in which he concluded that the Board did not have authority to grant a use variance for an accessory use. He thus recommended that the appellant's application be dismissed for lack of jurisdiction. The Board adopted the hearing officer's report and recommendation as its opinion and appellant appealed to the Circuit Court. Neither of these decisions specifically considered or attempted to harmonize the

Zoning Ordinance and the Animal Control Ordinance, Chapter 5 of the Montgomery County Code, although appellant contends that he requested that they do so.

Appellant wisely does not make any contention that the Board's decision on the merits of his variance application is incorrect. The entire thrust of appellant's argument on appeal is that the Board should have considered provisions of Chapter 5 of the Montgomery County Code (Animal Control), specifically Sec. 5-1, 5-30, 5-31, 5-32, and 5-67(c) and (f), in deciding his application. He asserts that these provisions should have been "harmonized" with the applicable provisions of Chapter 59.

Aside from the fact that, with the exception of Sec. 5-30, the sections cited by appellant do not apply to appellant's situation, the short answer to appellant's

argument is that none of those sections is relevant to a decision to grant or deny a use variance. [3] Sec. 5-30, the only section that arguably applies to appellant's situation, relates to the confinement of female dogs in heat. It provides:

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3. Sec. 5-1 defines a "dog fancier" (one who owns or keeps three or more dogs within or adjoining a private residence, three or more dogs for non-commercial purposes) and "dog fancier's kennel" (private kennel maintained by a dog fancier within or adjoining a private residence for the maintenance or training of dogs owned or kept by the fancier). Sec. 5-67(c) and (f) relate to the requirement that a dog fancier's kennel be licensed and the prohibition against issuing a license for a location which is in violation of the Zoning Code. Appellant does not contend that he is a dog fancier, owns a dog fancier's kennel, is licensed to operate a dog fancier's kennel or has applied for a license to operate a dog fancier's kennel, which was refused. At best, he is contending that his wife is a dog fancier. Even at that, however, he implicitly acknowledges that the purpose for seeking a variance as to enable his wife to run a kennel, non-commercial on the property. Accordingly, appellant does not have standing to make an argument premised on these sections.

Appellant conceded at oral argument

Every owner of a female dog shall, whenever the dog is in heat, keep it confined in a building, compartment or other secure enclosure, in such manner as to prevent the attraction of other animals.

It is apparent that this section in no way conflicts with Sec. 59-C-1.31. Sec. 5-30 does not require that female dogs in heat be confined out of doors; it requires only that they be confined in a building, compartment or other secure enclosure, in such manner as to prevent the attraction of other dogs. Since such confinement could be indoors, it is patent that compliance with its mandate may readily be had without the need for a variance. Therefore, this provision does not conflict with the Zoning Ordinance.

Since the provisions in Chapter 5 relied on by appellant either are

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3. that he does not have vicious or dangerous animals, Sec. 5-31, or attack dogs, Sec. 5-32. Consequently, he does not have standing pursuant to these sections either.

inapplicable to appellant's situation or do not conflict with the Zoning Ordinance, the Board had no occasion to "harmonize" them with the Zoning Ordinance. It follows that the court did not err in affirming its decision.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

WILBUR H. FRIEDMAN

Appellant

v. Civil No. 21338

COUNTY BOARD OF APPEALS FOR MONTGOMERY COUNTY, et al.

Appellees

O R D E R

The Court having considered the Motion for Reconsideration and the Appellant having presented no additional authority than that previously considered by the Court, it is, this 26th day of October, 1987,

ORDERED, that the Motion for Reconsideration is denied.

WILLIAM M. CAVE, Judge

Filed October 27, 1987

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

WILBUR H. FRIEDMAN

Appellant

v. Civil No. 21338

COUNTY BOARD OF APPEALS FOR MONTGOMERY COUNTY, et al.

Appellees

Having read and considered the Record below, and the Memoranda on Appeal submitted by both parties to this appeal; and having heard oral argument in the above-referenced case; and having found that:

1) Appellant requested the County Board of Appeals to grant him a use variance from a prohibited accessory use; and

2) The County Board of Appeals does not have the authority to grant a use variance, which is specifically prohibited by the Montgomery County Zoning Ordinance,

Section 59-G-3.1(d);

It is this 22nd day of September, 1987, by the Circuit Court for Montgomery County, Maryland;

ORDERED, that the decision of the County Board of Appeals for Montgomery County to deny the requested variance for lack of authority to grant is hereby AFFIRMED.

WILLIAM M. CAVE, Judge

Circuit Court for Montgomery County, Maryland

COUNTY BOARD OF APPEALS
FOR MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Md. 20850
Tel: (301) 279-1226

Case No. A-1590

APPEAL OF WILBUR H. FRIEDMAN

(Hearing held by Hearing Examiner July 18, 1986)

OPINION OF THE BOARD

On July 18, 1986, the Hearing Examiner for Montgomery County, Maryland, heard the above-entitled appeal pursuant to the provisions of Section 59-A-4.125 of the Zoning Ordinance. Case No. A-1590 is an appeal pursuant to Sections 59-A-4.11(b) and 59-C-1.3 for a variance from the provision contained in Section 59-C-1.31, which provides "that no accessory buildings, enclosures or runs may be constructed or used for... dogs" kept in non-commercial kennels in the R-60 Zone.

The subject property is part of Lot 2,

Lot 3 and Outlot A, Block B, College View Subdivision, located at 11404 Norris Drive, Silver Spring, Maryland, in an R-60 Zone.

The Board has carefully reviewed the record in this proceeding, including all documents in the file, the transcript of the public hearing as well as the Report and Recommendation of the Hearing Examiner dated August 21, 1986, and finds the Hearing Examiner's statement of facts to be correct. The Board concurs in and adopts the Report and Recommendation of the Hearing Examiner, attached hereto.

The Board adopted the following resolution:

BE IT RESOLVED by the County Board of Appeals for Montgomery County, Maryland, that the decision recommended by the Hearing Examiner be adopted as the decision of the Board on the above-

entitled appeal.

The foregoing resolution was proposed by Joseph E. O'Brien, Jr., Vice Chairman, and concurred in by Thomas S. Israel, Howard Jenkins, Jr., and Max H. Novinsky. The Board members aforementioned constitute the current members of the Board.

I do hereby certify that the foregoing Minutes were officially entered in the Minute Book of the County Board of Appeals this 3rd day of February, 1987.

Irene H. Gurman
Clerk to the Board

NOTE: Any decision by the County Board of Appeals may, within thirty (30) days, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

BEFORE THE COUNTY BOARD OF APPEALS FOR
MONTGOMERY COUNTY

Office of Zoning and Administrative
Hearings

Stella B. Werner Council Office Building
Rockville, Md. 20850
279-1341

IN THE MATTER OF:
WILBUR H. FRIEDMAN

Petitioner

Case No. A-1590

Wilbur H. Friedman, pro se

In support of the Petition

* * * * * * * * * *

James Leahigh
Margaret C. Lau
Walter A. Haas
Suzann C. Leahigh

In Opposition to the Petition

* *
Before: Martin Klauber, Hearing Examiner

HEARING EXAMINER'S REPORT AND
RECOMMENDATION

STATEMENT OF THE CASE

Case No. A-1590, filed on May 23,

1986, is an appeal pursuant to Sections

59-A-4.11(b) and 59-G-3.1 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1984) for a variance from the provision contained in Section 59-C-1.31, which provides "that no accessory buildings, enclosures or runs may be constructed or used for... dogs" kept in noncommercial kennels in the R-60 zone. The subject property is located at 11404 Norris Drive, Silver Spring.

Pursuant to Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals on May 22, 1986 (Exhibit No. 13) referred this matter to the Hearing Examiner and requested that this office conduct a public hearing in this case and render a written report and recommendation to the Board.

This case was the subject of a public hearing conducted on July 18, 1986, at which time evidence was received in

support of and in opposition to the variance. A letter from John H. McAleer, President of the College View Citizens Association (Exhibit No. 11) was received in opposition to the variance. The record in this matter was closed on July 25, 1986, subsequent to the receipt of the transcript of the public hearing.

ISSUES

Since this appeal requests a variance from the strict application of Section 59-C-1.31, based on the authority conferred to the Board of Appeals in Sections 59-A-4.11(b) and 59-G-1.31 of the Zoning Ordinance, the issues presented for determination in this case are:

1. Whether the Board of Appeals has the authority to grant the requested variance.

2. If the Board of Appeals does possess the authority to grant the requested variance, has the petitioner satisfied the burden of proof set out in Section 59-G-3.1.

3. Whether the requested variance, if

approved, would be in the public interest.

AUTHORITY OF BOARD OF APPEALS TO GRANT VARIANCE

Type of Variance. As delineated by the writers of zoning treatises and the courts of this State, there are two types of zoning variance, i.e., the "area" variance and the "use" variance.

The Court of Appeals in Loyola Loan Ass'n. v. Buschman, 227 Md. 243, 248 et seq. (1961) states that:

> Rathkopf, the Law of Zoning and Planning (1960 Supp. p. 169, supplementing p. 647 of the text) points out that use variances are customarily concerned with 'hardship' cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and that a variance must be permitted to avoid confiscatory operation of the ordinance. See Frankel v. City of Baltimore, 223 Md. 97... which was a case not merely of hardship, but of a taking in the constitutional sense (223 Md. at 101). Rathkopf next points out that area variances are concerned with 'practical difficulty'...
>
> "A practical distinction is pointed out by Rathkopf, op. cit. supra, at 180-181 of the 1960 Supp., between a use variance and

a height or area variance, citing two New York Cases - Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851, a use case, and Application of Bronxville v. Francis, 1 A.D. 2d 236, 150 N.Y.S. 2d 906, aff'd 153 N.Y.S. 2d 220, 1 N.Y. 2d 839, an area case. In the latter case the Appellate Division pointed out that an area variance may be allowed on proof of practical difficulty only, and that the basis for this lesser hardship (i.e., lesser than the undue hardship showing required in use cases such as Otto v. Steinhilber is that the character of the zoned district is not changed... the distinction recognized in New York does not emphasize the fact that variances going to such matters as size, height, or setbacks are much drastic than those affecting the use of property.

The late Judge Rita C. Davidson, writing for the Court of Special Appeals in Anderson v. Board of Appeals, 22 Md. App. 28, 37-38 (1974), states that:

The variances requested in this case involve an 'area variance' (a variance from area, height, density, setback, or side line restrictions, such as a variance from the distance required between buildings) and not a 'use' variance (a variance which permits a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses)...

The Court of Appeals has recognized a difference between a use variance, which

changes the character of the zoned district, and an area variance, which does not. Use variances are customarily concerned with "hardship" cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be required to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with 'practical difficulty'..."(Cite to Loyola v. Buschman, supra, deleted.)

The Hearing Officer notes that the petitioner has not offered testimony or evidence upon which a conclusion can be based as to what specific type of variance is requested.

However, certain assumptions can be drawn based on the petitioner's Pre-hearing brief (Exhibit No. 8(b)) and statements made during the public hearing of this case.

Petitioner, at p. 18 of his Pre-hearing Brief, states that:

"...land owner seeks a variance only for the purpose of utilizing fences to confine female dogs in heat and puppies, and internal system of fences are reasonable

(sic) necessary for both purposes... (Emphasis added.)

On cross examination by James Leahigh, petitioner reiterated that the purpose for which the variance was filed was to erect two fences "to confine female dogs and puppies." (TR 9).

The requested variance is not from the area, height, density, or setback restrictions contained in the R-60 classifications, the current zoning of the subject property. As indicated in the statements made by the petitioner during the public hearing, this variance relates to the erection of fences (not now permitted) and would allow for such uses as the confinement of female dogs in heat and the breeding of puppies (TR 44) which are uses that are not now possible on the subject property, there is the basis in this record to draw a conclusion as to the type of variance requested by the

petitioner.

Accordingly, based on the following considerations,I find and conclude that the petitioner in this case is requesting the Board of Appeals to grant a "use variance."

Section 59-G=3.1(a).. This section, as contained in the Zoning Ordinance reads as follows:

"59-G-3.1 AUTHORITY--BOARD OF APPEALS

The board of appeals may grant petitions for variances as authorized in section A-4.11(b) upon proof by a preponderance of evidence that:

(a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property...

An issue arises as to whether, based on the above set out portion of the Zoning Ordinance, the Board of Appeals has the

authority to grant "use" variances.

The phrase "exceptional narrowness, shallowness, shape, topographical conditions" is linked with the phrase "practical difficulties" and, consequently, there is basis to conclude that the Board has been delegated the authority to hear and decide area variances. But, does the phrase, "or other extraordinary situations or conditions peculiar to a specific parcel of property" when linked with the term "undue hardship" establish the basis from which it can be concluded that the Board of Appeals has the authority to consider use variances.

The significance of the term "undue hardship" will be considered in somewhat more detail in the Analysis section of this report.

The Hearing Examiner notes and emphasizes that the petitioner has

submitted no evidence or testimony concerning whether or not the Board of Appeals has authority to either consider or grant the type of variance requested.

If, on the other hand, the Board concludes that Section 59-G-3.1(a) does not contain authority to consider a "use variance," then the Hearing Examiner would conclude that the basic question to be resolved by the Board has been reached and no further analysis, consideration or determination in this case need be made. In this regard, an inquiry by the Board, if deemed appropriate, to the County Attorney may be of some assistance.

Type of Use. Assuming that the Board concludes that it has the authority pursuant to Section 59-G-3.1 of the Zoning Ordinance to consider petitions for "use variances," let us proceed to determine what type of use is being requested by

this petition.

Division 59-A-2 of the Zoning Ordinance contains the following definitions:

"Use. The principal use for which a a lot or the main building thereon is designated, arranged or intended and for which it is or may be used, occupied or maintained.

"Use. accessory. A use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building thereon, and (2) located on the same lot as the principle use or building...:

The specific prohibition contained in Section 59-C-1.3 from which a variance is requested by the petitioner reads:

"Provided that no accessory buildings, enclosures, or runs may be constructed or used for these dogs."

The Hearing Examiner notes that this verbiage was added to the Zoning Ordinance by the Council's adoption of Ordinance No. 8-39 on October 26, 1976. The ordinance, at page 2, states "in response to concerns expressed at the public hearing the

Council is of the opinion that Zoning Text Amendment No. 76-010 should be approved, but in response to concerns expressed at the public hearing be modified to prohibit any structural improvements in connection with a dog fancier's kennel."

The official Council file on this text amendment indicates that Ralph Wilson, the Council's Planning Coordinator, in a letter of October 22, 1976 to Mrs. Rose Crenca, then President of Allied Civic Group, Inc., stated that the Council at its worksession of August 30, 1976, modified the text amendment "to prohibit any structural improvements in connection with a dog fancier's kennel..."

The transcript of the Council's August 22, 1976 public hearing on Text Amendment 76-010 indicates that the specific verbiage from which the variance is being sought was proposed by the Animal Matters

Hearing Board and that the following testimony presented by the Board was the rationale for the inclusion of this prohibition:

> ...the Board has learned that there are no restrictions on the location of kennels, runs, or other accessory structures for non-commercial kennels in these Zones (i.e., the R-150, R-90, R-60 and R-40 Zones.) The County Attorney has advised the Board that the absence of specific restrictions, as are provided in the other zones, would in some cases allow the location of an accessory building, enclosure or run within two feet of a side or rear lot line. The Board believes that it would be contrary to the intent of this amendment to promote the construction of accessory structures in these zones..."

The Hearing Examiner notes and emphasizes that the evidence and testimony presented by the Petitioner does not allege that the subject property cannot continue to be used for its principle use as a single family detached residence in the existing R-60 Zone.

Additionally, if "enclosures" or "runs" are not principal uses permitted in

the R-60 Zone, then inevitably and logically the conclusion must be reached that the fences requested by the petitioner are accessory uses and that such fences, enclosures or runs are "incidental and subordinate to the principle use" of the subject property and the single family detached residence located thereon.

Based on the foregoing considerations and the evidence and testimony presented by the petitioner, the Hearing Officer finds and concludes that the Petitioner wishes to build fences which are characterized as "enclosures" or "runs" which are not the "principle" use of the R-60 Zone, but are "accessory uses" as included within the definition of that term contained in the Zoning Ordinance.

Accordingly, based on the foregoing considerations, I find and conclude that

the petitioner in this case is requesting the Board of Appeals to grant a use variance for an accessory use.

Query. Therefore, the specific query to be considered by the Board, under the circumstances, is:

Whether the Board of Appeals has the authority to consider a use variance from the prohibition of an accessory use.

Analysis. Where the phrase "other extraordinary situations or conditions" is linked with the term "exceptional or undue hardship," there is the basis from which to conclude that the Board has been delegated the authority to hear and decide use variances.

The Hearing Officer must, at this point, submit the following comment. He is aware that the following analysis is gratuitous. It should have been provided by the Petitioner but was not, and as such this is a failure by the Petitioner to

satisfy a requisite portion of his burden of proof. However, in the interest of fully and objectively exploring all of the salient issues presented by this case, such an analysis is necessary.

Legal research indicates that the term "hardship," especially when modified by such adjectives as "undue" and "unnecessary" delineates, according to Maryland decisions, the burden of proof to be satisfied when applying for a use variance.

The Court in Marino v. City of Baltimore, 215 Md. 206, 217 (1957) stated that:

> The criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership." [Citing Carney v. City of Baltimore, 201 Md. 130, 137 (1952).]

The "basic right of private ownership"

in the context of the instant case relates to Petitioner's continued usage of the subject property as a residential dwelling.

The court in Loyola Loan Ass'n v. Buschman, 227 Md. 243, 248 (1961), after citing Rathkopf, states that:

"...use variances are customarily concerned with 'hardship' cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and... a variance must be permitted to avoid confiscatory operation of the ordinance..."

The requested variance does not relate to the Petitioner's inability to use the subject property for one of the uses permitted in the R-60 Zone. The Zoning Ordinance in this instance has not imposed use restrictions which because of "extraordinary situations or conditions peculiar" to the subject property would result in the confiscation or the inability of the Petitioner to use the

site for one of the principle uses permitted in the R-60 Zone.

The Court in Baltimore v. Sapero, 230 Md. 291, 297 (1962) held that the applicant for the variance had satisfied the burden of proof required for a variance by proving "by clear and convincing evidence that they would be deprived of all reasonable use of the property, if the provisions of the... ordinance, as they relate to the use of the property, are applicable to it." (Emphasis added, cite to England v. Mayor & Council, 230 Md. 43 (1962).)

The Court of Appeals in Mayor and City Council v. Polakoff, 233 Md. 1, 9 (1963) stated that:

"[The board of appeals is] not to authorize a granting for the mere convenience to the owner but to require a showing of urgent necessity, hardship peculiar to the particular property, and a burden upon the owner not justified by the public health, safety and welfare."

It is evident that the Petitioner's hardship relates to his peculiar personal circumstances and is not directly related to the inability to use the subject property for its existing, principal, R-60 Zone use, i.e., as a single family detached residence.

The dismissal of this variance will not result in the Petitioner's being deprived of "all" reasonable use of the subject property. Nor does the restriction now imposed by the Zoning Ordinance, from which Petitioner seeks a variance, now operate to deprive him of all reasonable use of the subject property. This is the criterion to determine whether the Board has the authority to consider and/or grant a use variance from the restrictions imposed prohibiting certain accessory uses on a given property.

The prohibition of an accessory use,

by definition, cannot result in a Petitioner being deprived of all reasonable use of a given property because reasonable use is a term which describes those principal uses permitted in a zone.

The Petitioner's burden of use is stringent and his failure to address and satisfy its requisite elements is evident and critical. For the Court in Baltimore City v. Borinsky, 239 Md. 611, 622-623 (1965) has stated that:

"The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative... determination [in the instant case the adoption of the text amendment containing the prohibition now set out in footnote 2, page 84 of the Zoning Ordinance, which provides that in the R-60 Zone 'no accessory buildings, enclosures or runs may be constructed or used for these dogs.'] deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose.

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"...the burden is on the Appellee to show that her property cannot be used for any reasonable purpose." (Emphasis added.)

If the subject property could not, due to the provisions of the Zoning Ordinance, be used by the Petitioner for any reasonable purpose (i.e., a principal use) pursuant to the R-60 Zone, then a variance would be appropriate. It is clear that the zoning variance is a remedy linked to the hardship resulting from the inability to use a given piece of land for a reasonable or principal use. The inability to use the subject property for a desired accessory use is not the basis for a variance. The concept of "hardship," articulated by the courts of this State, as a basis for the granting of a use variance, clearly does not pertain to the inability to use one's property for a desired accessory use.

What the Petitioner requests, the

Board has no purview to consider or grant.

Accordingly, based on the foregoing considerations, I find and conclude that it is questionable as to whether the Board of Appeals has the authority to grant use variances and that the Board has no authority to consider and/or grant a use variance from a prohibited accessory use.

FINDINGS AND CONCLUSIONS

Based on the evidence of record and the arguments and the testimony advanced during the public hearing, I make the following findings and conclusions:

1. The Petitioner in this case is requesting the Board of Appeals to grant a "use variance."

2. There is a question as to whether Section 59-G-3.1(a) of the Zoning Ordinance grants the Board of Appeals the authority to consider a "use variance."

3. Assuming that the Board of Appeals concludes that it does possess the authority, pursuant to Section 59-G-3.1 of the Zoning Ordinance, to consider "use variances," the Petitioner in this case is requesting the Board of Appeals to grant a use variance from the Zoning Ordinance's

prohibition of an accessory use, as set forth in Section 59-C-1.31.

4. Therefore, the basic query presented by this case is whether the Board of Appeals has the authority to consider a "use variance" from a prohibited accessory use.

5. The Board of Appeals does not have the authority to consider a "use variance" from an accessory use which is specifically prohibited by the Zoning Ordinance.

RECOMMENDATION

I therefore recommend that Case No. 1590, Wilbur H. Friedman, Petitioner, for an appeal pursuant to Sections 59-A-4.11(b) and 59-G-3.1 of the Zoning Ordinance for a variance from the provisions contained in Section 59-C-1.31, which provides that no accessory buildings, enclosures or runs may be constructed or used for... dogs kept in non-commercial kennels in the R-60 Zone, be DISMISSED FOR LACK OF AUTHORITY.

Dated: August 21, 1986
Respectfully submitted,

Martin Klauber, Hearing Examiner